

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

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74-1872
NO. 74-2164

74-1872

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United States Court of Appeals
FOR THE SECOND CIRCUIT

SHOPMEN'S LOCAL UNION NO. 455, INTERNATIONAL ASSO-
CIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON
WORKERS, AFL-CIO,

Appellant-Appellee,

v.

KEVIN STEEL PRODUCTS, INC.,

Appellee-Appellant,

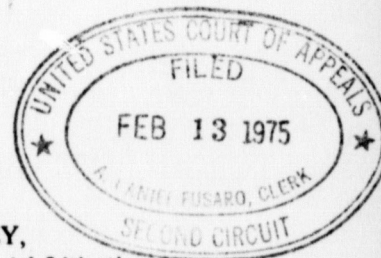
and

NATIONAL LABOR RELATIONS BOARD,

Intervenor-Appellee.

On Appeal from an Order of
The United States District Court for
The Southern District of New York

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD
AS INTERVENOR-APPELLEE**



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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-2154

SHOPMEN'S LOCAL UNION NO. 455, INTERNATIONAL ASSO-
CIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON
WORKERS, AFL-CIO,

Appellant-Appellee,

v.

KEVIN STEEL PRODUCTS, INC.,

Appellee-Appellant,

and

NATIONAL LABOR RELATIONS BOARD,

Intervenor-Appellee.

On Appeal from an Order of
The United States District Court for
The Southern District of New York

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD
AS INTERVENOR**

COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether the District Court properly reversed a Bankruptcy Court
order setting aside a collective bargaining agreement.

REFERENCES TO PARTIES AND RULINGS

This case is before the Board upon the appeal of Kevin Steel Products, Inc. (hereinafter "the Company") from a decision of the United States District Court for the Southern District of New York (per Knapp, D.J.) entered on August 1, 1974 (A. 391a-398a),¹ reversing a Bankruptcy Court order issued on March 1, 1974 (A. 358a-381a). Jurisdiction is present under Section 24 (11 U.S.C. § 47) of the Bankruptcy Act.

The Company, which was operating subject to the control of the Bankruptcy Court under Section 343 (11 U.S.C. § 743) of Chapter XI of the Bankruptcy Act, commenced the instant action by applying to the Bankruptcy Court below for an order permitting it to reject the unexpired portion of a collective bargaining agreement with Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (hereinafter "the Union") (A. 4a-8a). The Bankruptcy Court (per Schwartzberg, J.) granted the Company's application pursuant to Section 313(1) (11 U.S.C. 713(1)) of Chapter XI of the Bankruptcy Act and ordered that the unexpired portion of the collective bargaining agreement be set aside. The District Court reversed the Bankruptcy Court, holding that Section 313(1) of the Bankruptcy Act does not empower the Bankruptcy Court to terminate collective bargaining agreements.

The National Labor Relations Board (hereinafter "the Board") intervened in the District Court because the Bankruptcy Judge's order setting aside the collective bargaining agreement between the Company and the Union conflicted with the Board's decision of March 8, 1974 in 209

¹ "A." references are to the appendix to the parties' briefs.

NLRB No. 80, finding, *inter alia*, that the Company had agreed to the collective bargaining agreement involved herein but subsequently refused to sign it in violation of Section 8(a)(5) and (1) (29 U.S.C. § 158(a)(5) and (1)) of the National Labor Relations Act (hereinafter the "NLRA") and ordering that the collective bargaining agreement be signed and executed (A. 9a-27a, 384a-386a).² Additionally, the Board has a general interest in this bankruptcy appeal because it involves an examination of the relationship between its effective administrative of the NLRA and the operation of the Bankruptcy Act.

² The Board's application for enforcement of its order issued against the Company in 209 NLRB No. 80, filed pursuant to Section 10(e) of the NLRA, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), is before the Court in Case No. 74-1872. On August 26, 1974, the Board and the Company jointly moved the Court for entry of a partial consent judgment in Case No. 74-1872, the unfair labor practice proceeding. In said joint motion, the Company agreed to the entry of a consent judgment by the Court enforcing the Board's order with respect to violation by the Company of Sections 8(a)(1) and (3) of the NLRA and stipulated that it would not contest the Board's findings of fact and conclusions of law with respect to the Company's violation of Section 8(a)(5). The Board and the Company also agreed that enforcement of the Section 8(a)(5) portion of the Board's order in 209 NLRB No. 80 be held in abeyance pending the outcome of this bankruptcy proceeding, Case No. 74-2154. Subsequently, the Board, the Company, and the Union jointly moved for consolidation of Case No. 74-2154 and 74-1872, which motion was granted on October 17, 1974 (401a-404a). Since the Board's uncontested findings of fact and conclusions of law in 209 NLRB No. 80 were part of the record in the bankruptcy proceedings below, the Board's decision and order in 209 NLRB No. 80 before the Court for enforcement in Case No. 74-1872 is also a part of the record before the Court in this bankruptcy appeal.

COUNTERSTATEMENT OF FACTS

A. Background: the Company's unfair labor practices

The Company is engaged in the fabrication and distribution of steel and related metal products in West Haverstraw, New York (A. 360a, 392a; 9a).³ In 1968, the Company entered into its first collective bargaining agreement with the Union which represents the Company's production and maintenance employees, referred to as "shopmen" (A. 360a, 392a; 10a). Under this agreement, the Union permitted the Company a grace period of two years during which time it could pay its shopmen less than the rate prevailing under collective bargaining agreements in the steel fabrication industry (A. 360a). At the conclusion of this two year period the Company and the Union entered into a second collective bargaining agreement for the period July 1, 1970 through June 30, 1973 which required the Company to pay the industry-wide collective bargaining rate to its shopmen (A. 360a, 392a; 10a). After the Company's organization by the Union, it grew from a small concern mainly involved in the fabrication of irons and railings to a fabricator of large structural steel columns for buildings bidding on jobs in the \$25,000 to \$500,000 range (A. 71a, 217a-218a).

Early in 1972, Company President Robert Palatnik offered employees "more liberal fringe benefits, if they would repudiate the Union" (A. 13a). "Beginning in 1972," a supervisory employee had conversations with Palatnik in which the latter "promised to make certain improvements in the existing retirement and hospitalization plans, if the employees would defect from the Union" (A. 13a).

³ Where appendix references are separated by a semicolon, those preceding the semicolon are to findings by the District Court and the Bankruptcy Court below and those following are to other documents, including the decision and order of the Board in 209 NLRB No. 80.

On February 15, 1973,⁴ when the Company employed approximately 15 shopmen, the shopmen struck after notice to the Company that it was delinquent in payment of \$15,000 owed to the shopmen's pension and welfare fund under the contract between the Company and the Union (A. 360a, 393a; 14a). Before striking the Company, the Union was "lennient with the [Company's] delinquency for ten months" (A. 267a). By letter of February 15, the day the strike began, the Company informed the strikers that they were being laid off for lack of work and that they would be advised when they were needed again (A. 14a). On February 16, Palatnik told a striking employee that he "would have plenty of work if he went non-union" (A. 13a). On February 20, Palatnik told a second striker that he was going "to try to stick it out" until July 1, the expiration date of the contract with the Union, but that he would be willing to "open the shop" if the Union would replace Leggio, the "shop steward" (A. 14a).⁵ About the same time, Palatnik told a third employee that he deplored the existing situation but "could not do anything else because of the union" (A. 14a). Palatnik told this employee that he could return to work at any time but that the shop could not be opened as long as Leggio might work there (A. 14a).

By February 21, the Company had made the required payment to the Union fund (A. 360a, 393a; 10a, 14a). When the Union informed the Company that the strike was over and requested reinstatement for the employees, Palatnik said that he would continue to operate as he had

⁴ Hereinafter, unless otherwise indicated, all dates refer to 1973.

⁵ The main reason for Palatnik's opposition to Leggio was his belief that the shop steward was "overstepping his role" and "exercising excessive zeal" in insisting upon strict enforcement of the collective bargaining agreement (A. 14a-15a, 18a-19a; 212a).

during the strike with only one employee (A. 361a, 393a; 11a, 14a). Palatnik did not comply with the contract's seniority clause in determining which shopman would be employed, assuming that compliance with the contract would require that Leggio, the shop steward, be recalled first (A. 15a n. 9, 211a). About March 1, Palatnik told Union President Colavito that he had no work for the men, adding that, even if he had work, he would not recall them as long as Leggio was the shop steward (A. 11a, 212a). On March 30, the Company notified the laid off employees that they were permanently terminated (A. 11a).

Negotiations between the Company and the Union for a new contract to succeed the contract expiring on June 30 commenced about May 1 (A. 393a; 11a, 20a). At this meeting and at a later one, on May 15, the main obstacles to agreement were Palatnik's opposition to Leggio's return as shop steward and his objection to the existing wage scale (A. 11a, 20a). On May 21, as a concession to the Company, the Union proposed that it would grant the Company an extension of the current contract, pending negotiation of a new contract with other area employers in the industry,⁶ with the stipulation that the Company would adopt any new agreement reached with such employers and that the Union would not strike the Company during such negotiations (A. 361a; 20a). Palatnik agreed to sign a contract embodying the terms proposed by the Union, subject to approval by counsel for the Company and the Union

⁶ About 175 competitors of the debtor are signatories to contracts with the Union (A. 213a). Although some small shops operating in the debtor's area of Rockland County are non-union, other shops in the area that bid on work in the \$25,000 to \$500,000 range and are therefore in direct competition with Kevin Steel are under contract with the Union (A. 366a-367a; 110a-111a, 223a-225a). Kevin Steel also competes for work outside Rockland County against other companies whose employees are represented by the Union (A. 112a).

on appropriate language (A. 20a-21a). By June 1, counsel for the Company had approved a contract draft submitted by the Union (A. 21a). On that date, Palatnik reviewed the draft and acknowledged that it reflected the agreement reached by the parties on May 21, but refused to sign the contract (A. 393a; 22a). In July, after the expiration date of the old contract, Palatnik rehired three shopmen who then resigned from the Union (A. 81a-85a, 159a).

On June 11, charges were filed with the Board alleging that the Company had violated Sections 8(a)(1), (3), and (5) of the NLRA by offering an employee an inducement to abandon the Union, by laying off and subsequently terminating employees because of their shop steward's insistence on strict enforcement of the collective bargaining agreement, and by refusing, on and after June 1, 1973, to sign a document embodying the agreement between the Union and the Company (A. 393a; 9a-10a). A complaint issued on July 31, a hearing was held before an Administrative Law Judge of the Board on August 28 and 29, and, on November 21, the Administrative Law Judge issued his decision, finding that the alleged violations had been committed (A. 393a-394a; 23a). The Judge, whose decision was affirmed by the Board on March 8, 1974, ordered the Company to cease and desist from "discriminating against employees because of their insistence, or the insistence of their representative, on strict enforcement of the provisions of a collective bargaining contract" with the Union, "offering employees inducements to defect" from the Union, and refusing to bargain in good faith with the Union "by refusing, upon request, to sign the contract submitted by said Union on June 1, 1973" (A. 394a; A. 25a). Affirmatively, the Company was required, *inter alia*, to execute the contract submitted by the Union on June 1, 1973, to give retroactive effect thereto from July 1, 1973, making the employees whole for any loss of wages or other benefits suffered as

a result of its failure to sign the agreement, with interest, and to offer reinstatement to the unlawfully discharged employees, with backpay (A. 394a; 25a). The Company refused to comply with the Board's decision (A. 394a; 158a).

B. The proceedings below

On September 13, shortly after the hearing before the Administrative Law Judge, the Company filed a petition for an arrangement under Chapter XI of the Bankruptcy Act with Bankruptcy Judge Howard Schwartzberg (A. 359a-360a, 393a). On that date, Judge Schwartzberg entered an order under Section 343 of the Bankruptcy Act (11 U.S.C. § 743) authorizing the Company to operate the business, subject to the court's control (A. 360a). On December 17, shortly after the issuance of the Administrative Law Judge's decision, the Company petitioned Bankruptcy Judge Schwartzberg for an order permitting it to cancel and reject the unexpired portion of the collective bargaining agreement which the Administrative Law Judge had ordered that the Company execute (A. 4a-8a). In its application, the Company alleged that "the prime reason for the economic difficulties leading up to the filing of the Chapter 11 petition . . . was labor problems" with the Union, especially the "high wages demanded by the Union" (A. 6a). The Company did not apply for cancellation of its collective bargaining agreements with two other unions, representing its outside erection men and a trucking employee (A. 361a; 115a), although the wages and benefits paid by the Company to its outside erection employees under the collective bargaining agreement which covered them were as high as those which it was obligated to pay under its contract with Local 455 (A. 185a).⁷

⁷ The Company's shopmen are highly skilled and their work is dangerous (A. 218a-219a).

On March 1, 1974, after an evidentiary hearing, Bankruptcy Judge Schwartzberg granted the Company's application and ordered that the unexpired portion of the collective bargaining agreement be set aside (A. 381a, 394a). In so ordering, the bankruptcy judge followed *In Re Klaber Bros., Inc.*, 173 F. Supp. 83 (S.D.N.Y., 1959), which held that Section 313(1) (11 U.S.C. § 713(1)) of the Bankruptcy Act authorizes the rejection of collective bargaining agreements in arrangement proceedings (A. 375a, 379-380a). Having ruled that the Bankruptcy Court was vested with the power to reject collective bargaining agreements, Bankruptcy Judge Schwartzberg found that the power to reject should be exercised in this case because the Company's contract with the Union imposed a "burdensome and onerous obligation tending to impair [its] chances for promulgating a successful plan of arrangement" (A. 372a).⁸

The District Court agreed with the Bankruptcy Court's finding that, assuming a collective bargaining agreement is a contract which can be rejected pursuant to Section 313(1) of the Bankruptcy Act, the contract between the Company and the Union was "sufficiently burdensome and onerous" to warrant its rejection (A. 395a). However, the District Court reversed the Bankruptcy Court, finding that Congress did not intend to

⁸ The Bankruptcy Court also found "no evidence to support a finding that the debtor's motive for filing a petition under Chapter XI and for its application for leave to reject the aforesaid collective bargaining agreement as burdensome and onerous is mainly aimed at contravening the federal policy of encouraging the creation and enforcement of collective bargaining agreements under the National Labor Relations Act" (A. 372a). However, by letter of April 15, 1974, the Company informed the Union that, since the collective bargaining agreement had been set aside, it would pay employees at the rate of \$3.50 per hour and would not contribute to any of the Union's plans (A. 387a-388a). By letter of April 18, 1974, the Company informed the Board's regional office that if "it operates at all, Kevin will operate under Chapter 11 auspices, without a union contract" (A. 389a-390a).

include collective bargaining agreements in the class of contracts which can be set aside in bankruptcy proceedings (A. 397a). In so ruling, the District Court relied upon two Supreme Court cases, *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1963) and *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-579 (1960), which stand for the proposition that collective bargaining agreements are *sui generis* and can not be treated as ordinary contracts (A. 397a-398a).^{8a}

ARGUMENT

THE BANKRUPTCY ACT DOES NOT AUTHORIZE THE REJECTION OF COLLECTIVE BARGAINING AGREEMENTS IN BANKRUPTCY PROCEEDINGS

As the District Court below stated, this case "squarely presents the question of how to reconcile the conflicting policies embodied respectively in the National Labor Relations Act and in the Bankruptcy Act" (A. 394-395a). The District Court resolved this conflict by holding, contrary to the Bankruptcy Court below, that the Bankruptcy Act does not vest Bankruptcy Courts with the power to set aside collective bargaining agreements because "Congress intended to distinguish collective bargaining agreements as a class from all other contract" (A. 397a). We submit that the District Court's determination was a proper resolution of the conflict between the NLRA and the Bankruptcy Act.⁹

^{8a} The District Court's ruling on the issue of power to reject collective bargaining agreements obviated the need for consideration of certain other contentions made by the Board in its brief to the District Court.

⁹ Although, as the Company notes (Br. 11-16), the District Court's ruling in this case departs from earlier decisions in that court, the issue of whether the Bankruptcy Act confers the power to reject collective bargaining agreements has never been presented to the appellate courts. *American Anthracite & Bituminous Coal Corp. v. Leonardo Arrivebene S.A.*, 280 F.2d 119 (C.A. 2, 1960), cited by the Company (Br. 11) as authority for the proposition that "[t]here is no restriction on the type of executory contract that may be rejected" pursuant to the Bankruptcy Act, does not affirmatively hold that a collective bargaining agreement can be set aside in a bankruptcy proceeding. Rather, it holds that Section 306(1) (11 U.S.C. § 706(1)) of the

(continued)

Section 313(1) of Chapter XI of the Bankruptcy Act provides that, upon the filing of a petition for an arrangement, the Bankruptcy Court "may . . . permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracts and to such other parties in interest as the court may designate."¹⁰ The Bankruptcy Court below placed undue emphasis upon the literal language of this section of the Bankruptcy Act in granting the Company's application for rejection of its collective bargaining agreement with the Union, following *Klaber, supra*, also followed in *In The Matter of Business Supplies Corporation of America*, 72 LC § 13,940 (S.D.N.Y., September 7, 1973). The court in *Klaber, supra*, 173 F. Supp. at 84-85, held,

⁹ (continued) Bankruptcy Act, which defines "executory contracts" for the purposes of Chapter XI of the Bankruptcy Act to include "unexpired leases of real property," "does not carry the negative implication that all other classes [of contracts] are excluded." *Ibid.* at 125. Furthermore, the Board was not a party to *Klaber, supra*, the leading case on this issue, and, accordingly, did not have an opportunity to present its views to the Southern District of New York in *Klaber*. Under these circumstances, the re-examination by the District Court below of the issue decided adversely to the Board's position in *Klaber* was appropriate.

¹⁰ Chapter X, the reorganization section of the Bankruptcy Act, contains a similar provision in Section 116(1) (11 U.S.C. § 516) permitting the rejection of executory contracts by a bankruptcy judge. Section 70(b) (11 U.S.C. § 110(b)) of the straight bankruptcy provisions states that the "trustee shall assume or reject an executory contract" within a specified period of time. Section 70(b) further provides that "[a]ny such contract or lease not assumed or rejected within that time shall be deemed to be rejected."

It is clear that there is no intent to limit the application of the authority and power granted to the court in Title 11 U.S.C.A. § 713 to reject executory contracts

... . The Bankruptcy Act makes no distinction among classes of executory contracts. The power to permit rejection of an executory contract should be exercised where rejection is to the advantage of the estate. Where the contract is detrimental, its rejection should be permitted. [T]here should be no differentiation in the treatment of executory employment or collective bargaining contracts as to termination under the circumstances of this case.

However, as the Supreme Court has observed, "Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions." *Boys Market v. Retail Clerks Union Local 770*, 398 U.S. 235, 250 (1969). "Even on the doubtful premise that the words . . . unambiguously embrace [the matter in question], this does not end inquiry into Congress' purpose in enacting the section. It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *National Woodwork Manufacturers Ass'n v. N.L.R.B.*, 386 U.S. 612, 619 (1967). *Klaber*, in focusing on the literal language of Section 313(1) of the Bankruptcy Act, erroneously failed to take into account the context of that language and the existence of other directly conflicting statutory provisions, the overall intent of Congress in enacting the Bankruptcy Act and the NLRA, and considerations of policy, all of which, as shown below, mandate the conclusion that bankruptcy courts do not possess the power to set aside collective bargaining agreements.

1. The context of the language in Section 313(1) of the Bankruptcy Act and the existence of other directly conflicting statutory provisions are persuasive evidence that Section 313(1) was not meant to sanction the rejection of collective bargaining agreements

Klaber's literal reading of Section 313(1) of the Bankruptcy Act was erroneous because the *Klaber* court totally failed to consider the direct conflict between the language of that section and Sections 8(a)(5) and (d) (29 U.S.C. § 158(a)(5) and (d)) of the NLRA.¹¹ Section 8(a)(5) of the NLRA makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees. Section 8(d) of the NLRA defines the Section 8(a)(5) duty to bargain collectively as meaning that no party to a collective bargaining agreement shall "terminate or modify it" unless the party desiring such termination or modification

- (1) serves a written notice upon the other party to the contract . . . ;
- (2) offers to meet and confer with the other party . . . ;
- (3) notifies the Federal Mediation and Conciliation Service and simultaneously therewith . . . any State or Territorial agency established to mediate and conciliate disputes within the State or Territory . . . ;
- (4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: . . . [T]he duties so imposed shall not

¹¹ As the Company notes (Br. 15), *Klaber, supra*, 173 F. Supp. at 84, held that the issue of whether the Bankruptcy Act sanctions the rejection of collective bargaining agreements does not involve a conflict between Section 272 (11 U.S.C. § 672) of the Bankruptcy Act and the NLRA. Clearly, however, neither *Klaber* nor *Business Supplies Corporation, supra*, considered the effect of 8(a)(5) and 8(d) of the NLRA, the sections upon which the Board's successful argument to the District Court against the existence of such power of rejection was based.

be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

Section 8(d), which was enacted in 1947, is absolute on its face,¹² and Congress nowhere indicated that the earlier enacted provisions of the Bankruptcy Act would constitute any limitations on it. Yet, a determination that Section 313(1) of the Bankruptcy Act vests bankruptcy courts with power to set aside collective bargaining agreements means that a union, contrary to the express provisions of 8(d), can be required to agree to a modification of the terms and conditions contained in its collective bargaining agreement. Accordingly, a literal interpretation of Section 313(1) of the Bankruptcy Act as authorizing the rejection of collective bargaining agreements in arrangement proceedings permits a company to accomplish indirectly what it could not accomplish directly without violating the NLRA - namely, to unilaterally terminate a contract during its term.¹³ Furthermore, in straight bankruptcy where, as shown, *supra*, p. 11 n. 10, the trustee, rather than the bankruptcy court, is empowered to reject executory contracts, the power to reject collective bargaining agreements would allow trustees who are parties to collective bargaining

¹² The only exception contained in Section 8(d) is that the provisions of paragraphs 2, 3, and 4 "shall become inapplicable upon an intervening certification by the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees. . . ."

¹³ The facts of this case strikingly demonstrate the clash between a literal reading of Section 313(1) and Sections 8(a)(5) and 8(d) of the NLRA. For here, the Board, in order to remedy the Company's violation of Section 8(a)(5), ordered the Company to sign and give effect to the very contract which the Bankruptcy Court below ordered set aside. See, *N.L.R.B. v. Strong Roofing Co.*, 393 U.S. 357 (1969).

agreements to violate the NLRA *directly* by exercising the power of unilateral termination.¹⁴ In view of the effect of a literal interpretation of Section 313(1) upon the operation of Sections 8(a)(5) and 8(d), a determination that collective bargaining agreements may be set aside in bankruptcy undermines the policies of the NLRA and the power of the Board to enforce those policies.

¹⁴ The Company argues (Br. 23-24) in essence that, in prohibiting a party to a collective bargaining agreement from unilaterally terminating it, Section 8(d) of the NLRA does not conflict with authorization to a bankruptcy court to reject such an agreement because the court is not a party to the agreement. However, elsewhere in its brief (13), the Company indicates its assumption that, if bankruptcy courts are empowered to reject collective bargaining agreements in arrangement and reorganization proceedings, a concurrent power to reject collective bargaining agreements is vested in trustees in straight bankruptcy pursuant to Section 70(b). Thus, the Company relies on *Carpenters Local Union No. 2746 v. Turney Wood Products, Inc.*, 289 F. Supp. 143, 150 W.D. Ark., 1968), which states that "it is arguable that there is more reason for permitting rejection of a collective bargaining contract in a straight bankruptcy proceeding than in a proceeding under the other Chapters of the Act" and holds that the inclusion of collective bargaining agreements in the class of contracts that can be rejected pursuant to Section 313(1) in arrangement proceedings mandates the same conclusion for Section 70(b). Accordingly, since a trustee in bankruptcy is a "person" subject to the provisions of the NLRA under Section 2(1) (29 U.S.C. § 152(1)), its rejection of a collective bargaining agreement would directly conflict with the prohibition against unilateral termination of Section 8(d). The subsequent history of *Turney Wood Products, supra*, amply demonstrates this point. For, after the district court in that case upheld the rejection of the contract by the receiver, who later became trustee, the Board issued a complaint against the trustee alleging a violation of Section 8(a)(5) of the NLRA in the unilateral reduction of wages and work force as consequences of the rejection. See *Durand v. N.L.R.B.*, 296 F. Supp. 1049 (W.D. Ark., 1969).

The court in *Klaber*, then, and the Bankruptcy Court below, in relying on *Klaber*, determined, in effect, that Section 8(d), as a direct and specific expression of Congressional policy with respect to collective bargaining agreements, was *pro tanto* invalidated by Congress' earlier, general grant of power to bankruptcy courts and bankruptcy trustees to reject contracts. This determination, with its reliance upon the "isolated words" (*Boys Market v. Retail Clerks Union, Local 770, supra*, 398 U.S. at 250) "executory contract" in the Bankruptcy Act provisions authorizing rejection, overlooks the long-settled principle that "a collective bargaining agreement is not an ordinary contract." *John Wiley & Sons v. Livingston, supra*, 376 U.S. at 550. Rather, "it is a generalized code to govern . . . the whole employment relationship. It calls into being a new common law - the common law of a particular industry or of a particular plant." *United Steelworkers v. Warrior & Gulf Navigation Co., supra*, 363 U.S. at 578-579. "Central to the peculiar status and function of a collective bargaining agreement is the fact that it is not in any real sense the simple product of a consensual relationship." *John Wiley & Sons v. Livingston, supra*, 376 U.S. at 550.

When most parties enter into a contractual relationship they do so voluntarily in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability pre-exists the negotiations. Rather it is between having that relationship governed by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces. *Ibid.* at 580.

The fact that neither *Klaber* nor the Bankruptcy Court below focused on the peculiar status of a collective bargaining agreement as something

other than an "ordinary contract" further demonstrates the deficiencies in the *Klaber* analysis which led to its misreading of the intent of Congress.

2. Congress clearly did not anticipate or intend that collective bargaining agreements could be rejected in bankruptcy proceedings

Additional persuasive evidence for the proposition that a collective bargaining agreement is not an "executory contract" which can be set aside in bankruptcy under Section 313(1) is the fact that, despite the complex and distinct nature of collective bargaining agreements, both the Bankruptcy Act and the NLRA are silent as to the legal consequences of rejection of a collective bargaining agreement, as opposed to an ordinary commercial contract. The court in *Klaber, supra*, 173 F. Supp. at 85, citing 8 Collier on Bankruptcy, 14th Ed., p. 163, found that an executory contract "cannot be rejected in part, and assumed in part The contract must be rejected in its entirety or not at all." Under Sections 63(c) (11 U.S.C. § 103) and 353 (11 U.S.C. § 753) of the Bankruptcy Act, the rejection of an executory contract in an arrangement proceeding constitutes a breach of such contract, and any person injured by such rejection is deemed a creditor entitled to sue for damages for such breach. This remedy, though obviously adequate relief for commercial creditors, (*In re New York Investors Mut. Group*, 143 F. Supp. 151, 154 (S.D.N.Y., 1956)), is clearly inadequate with respect to the many intangible rights lost by both a union and the employees it represents in the total rejection of a collective bargaining agreement. And, while a commercial creditor subjected to a breach of contract can mitigate damages by contracting elsewhere, continued operation of the bankrupt's business continues the employment relationship and perpetuates the harm to the union and employees resulting from breach. Thus, given the importance of collective bargaining agreements and the Supreme Court's emphasis upon their

status as "generalized codes" rather than mere contracts, it is apparent that if Congress had intended to permit the rejection of collective bargaining agreements under the Bankruptcy Act, as well as the rejection of ordinary contracts, it would have specifically stated this intention and would have spoken to the consequences of their rejection.¹⁵

"The basic policies of the bankruptcy law are to preserve the funds of the debtor for distribution to creditors and to give the debtor a new start, while the basic policy of the labor law is always to encourage creation and enforcement of collective bargaining agreements." *Collective Bargaining and Bankruptcy*, 42 S. Cal. L. Rev. 477 (1969). This latter policy, as expressed in the NLRA, "is the keystone of the federal scheme to promote industrial peace" (*Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 104 (1961)) and, accordingly, is intended to protect the public as a whole as well as individual unions, employers, and employees. Although the aforementioned policies of the bankruptcy law sanction the setting aside of executory commercial contracts to the advantage of the bankrupt and its creditors, these policies are outweighed with respect to collective bargaining agreements whose rejection would advantage a few

¹⁵ The Company's argument (Br. 23-24) that courts have sustained modifications in collective bargaining agreements by the Cost of Living Council and the Pay Board "with only implicit Congressional authority" is incorrect. As stated in *United States v. International Bro. of Elec. Wkrs., Local Union No. 11*, 475 F.2d 1204, 1205 (T.E.C.A., 1973), cited by the Company, the Economic Stabilization Act of 1970 (P.L. 91-379, 84 Stat. 799, 12 U.S.C. § 1904, note) expressly "authorized the President to issue such orders and regulations as he deemed appropriate to stabilize wages and salaries at levels not less than those prevailing on May 25, 1970." Thus, with respect to the alteration of collective bargaining agreements by the Cost of Living Council and the Pay Board, Congress specifically stated its intention in the Economic Stabilization Act.

individual entities at the expense of the public at large and at the expense of employees who, unlike the average business creditor, cannot spread losses from breach of contract to others as a cost of doing business. As one commentator has aptly noted,

[t]he suggestion that labor should assume business risks and suffer its rights to be adjudicated in bankruptcy seems to overlook the fact that a labor agreement is not a business transaction, avoidance of which affects only its parties and is readily compensable in money, but more closely resembles an armed truce, which if not observed brings recurrence of the agitation that preceded it and that may now spread throughout the industry as other employers are induced by the debtor's competitive advantage to seek avoidance of their contracts by similar tactics. Notes and Legislation, 53 Harv. L. Rev. 1360, 1364-1365 (1940).

Moreover, the Bankruptcy Act itself provides evidence that the public interest in industrial peace and concern for the protection of employees underlying the provisions of the NLRA takes precedence over the interests of a bankrupt employer and its creditors. Thus, certain union wage claims are given priority over the claims of other creditors under Sections 64(a)(1) and (2) (11 U.S.C. § 104(a)(1) and (2)) of the Bankruptcy Act. More significantly, Congress provided in Section 77(n) (11 U.S.C. § 205(n)) of the Bankruptcy Act that the wages and working conditions of railroad employees can only be changed in the manner prescribed in the Railway Labor Act, as amended June 21, 1934 (45 U.S.C. § 151, *et seq.*).¹⁶ On the other hand, no provision in the NLRA indicates that it is in any way overridden

¹⁶ Since the intent to encourage the specific enforcement of collective bargaining agreements behind the Railway Labor Act and the NLRA is essentially the same (See *Turney Wood Products, supra*, 289 F. Supp. at 148), it follows from Section 77(n) that the working conditions of employees under the NLRA should not be changed without complying with Section 8(d) of the NLRA. The failure of the Bankruptcy

(continued)

by the Bankruptcy Act. Rather, Section 2(1) (29 U.S.C. § 152(1)) of the NLRA provides that a trustee in bankruptcy is a "person" subject to the provisions of the NLRA, and Section 15 (29 U.S.C. § 165) of the NLRA states that where Section 272 (11 U.S.C. § 672) of the Bankruptcy Act conflicts with the National Labor Relations Act, the latter prevails. All these provisions, taken together, are persuasive evidence that, given the apparent conflict between the policies of the NLRA and the Bankruptcy Act present in the question of rejection of a collective bargaining agreement, the NLRA was intended to prevail.

¹⁶ Act to expressly forbid the rejection of NLRA collective bargaining agreements in contravention of the requirements of Section 8(d) is due to the fact that Section 8(d) was enacted in 1947, subsequent to the provisions in the Bankruptcy Act sanctioning the rejection of executory contracts. The provisions in the Railway Labor Act relating to changes in working conditions, on the other hand, antedated the comprehensive revision of the Bankruptcy Act in 1938 and, accordingly, were specifically mentioned in it.

The Company's general discussion (Br. 18-22) of certain differences between the NLRA and the Railway Labor Act is irrelevant, given the special nature of collective bargaining agreements and the fact that, while Section 8(d) speaks specifically to such agreements, the Bankruptcy Act provisions authorizing rejection of "executory contracts" do not specifically include collective bargaining agreements. Furthermore, the Company errs in claiming (Br. 23-24) that because Congress referred to Section 77 of the Bankruptcy Act at one point in the legislative history of the NLRA, it could have gone on and specifically exempted collective bargaining agreements from the operation of the bankruptcy provisions at issue here if it had so intended, since the reference to Section 77 in the NLRA's legislative history cited by the Company (Br. 23) is taken from the original 1935 enactment of the NLRA, which, as noted above, did not contain Section 8(d).

3. Considerations of public policy militate against permitting the rejection of collective bargaining agreements in bankruptcy proceedings

Finally, allowing the rejection of collective bargaining agreements in bankruptcy unwisely and unnecessarily encourages the use of bankruptcy proceedings as a refuge for businesses with labor problems which would prefer to operate free of a union contract.¹⁷ Although most disputes between employers and unions involving bankruptcy proceedings are unreported, those cases which are available for examination suggest that a petition for an arrangement or a reorganization followed by an application to reject a collective bargaining is more often than not indicative of use of the Bankruptcy Act to escape the requirements of the NLRA. Thus, in *In Re Mamie Conti Gowns*, 12 F. Supp. 478, 480 (1935), this Court found that the debtor had entered into a reorganization proceeding to discard a contract with a labor union. In *Farrulla v. Ralph A. Freundlich, Inc.*, 277 N.Y. Supp. 47, 63 (Sup. Ct., 1934), the employer successfully moved to have its labor contract set aside by filing a petition for a reorganization after several unsuccessful attempts in New York to avoid a labor agreement, removal to Massachusetts where it violated the contract, and a shut down following a New York injunction against this violation. See *Ralph A. Freundlich, Inc.*, 2 NLRB 802, 807 (1937). The court in *Teamsters v. Quick Charge, Inc.*, 14 L.C. par. 64,496 (C.A. 10, 1948), found that "the sole purpose on the part of *Quick Charge* in filing reorganization proceedings . . . was to rid itself of the labor dispute with the union." See also *In Re Cleveland & Sandusky Brewing Co.*, 11 F. Supp. 198, 207 (N.D. Ohio, 1935), wherein a similar intimation of impropriety was made. The union in *Klaber, supra*, 173 F. Supp.

¹⁷ This is especially true in industries where most businesses are undercapitalized and, accordingly, are eligible to enter a reorganization or arrangement proceeding at any time.

at 85, "recognized the injury to the estate if the contract were to be continued and offered . . . concessions." Nevertheless, the debtor applied for rejection of the entire collective bargaining agreement, and the debtor's request was granted on the basis of the union's admission that a portion of the contract was a burden on the estate.

Similarly, and most significantly, as the Statement of Facts amply demonstrates, the Company's petition for an arrangement and subsequent application for rejection of the collective bargaining agreement in the case at bar was the culmination of a campaign to undermine the representative status of the Union which began in early 1972 and continues to date. By the Company's own admission the "prime reason" for the petition for an arrangement was "labor problems" with the Union (*supra* at 8). The Company applied for rejection of the collective bargaining agreement with the Union soon after it was ordered to honor the agreement by the Administrative Law Judge but failed to apply for rejection of its contracts with two other unions, one of which provides for wages and benefits as high as those under the Local 455 contract. The Company's statement that "[i]f it operates at all, Kevin will operate under Chapter 11 auspices, without a union contract" (*supra* at 9), considered in light of its continuing obligation to bargain with the Union (A. 379a), provides convincing evidence that the Company's intention in invoking the authority of the Bankruptcy Court below was to avoid its obligation to honor its collective bargaining agreement with the Union and to remedy its unfair labor practices.

In sum, in most cases involving a petition for rejection of a collective bargaining agreement by a company in arrangement or reorganization proceedings, the bankruptcy court accepts the claim of the bankrupt that its collective bargaining agreement is burdensome and should be

rejected with little probing of the motives leading to the request for rejection. In straight bankruptcy, since the decision of whether to reject a collective bargaining agreement is made by the trustee itself, rather than by the bankruptcy court, and a contract not assumed within a specified period of time is deemed rejected under Section 70(b) (11 U.S.C. § 110 (b)), it seems apparent that collective bargaining agreements, which complicate the orderly liquidation of the bankruptcy, are frequently perfunctorily rejected. The almost mechanical rejection of collective bargaining agreements which accompanies the power to reject such contracts occurs at the expense of employees who have no means of recouping their losses and whose only remedy is utilization of the right to strike which, in turn, impairs industrial peace and harms those for whom the power of rejection is exercised, the debtor and its creditors. On the other hand, if collective bargaining agreements are not set aside in bankruptcy, unions have an interest in agreeing to the modification of burdensome contract terms to prevent employers from going out of business, thereby preserving jobs for their members. On balance, as the District Court below found, it does seem "more logical to assume that Congress intended to distinguish collective bargaining agreements as a class from all other contracts" than that it intended to endorse the adverse consequences to employees and the public of allowing the rejection of collective bargaining agreements by employers who have filed proceedings in bankruptcy (A. 397a).

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the order of the District Court should be affirmed.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SHOPMEN'S LOCAL UNION NO. 455,
INTERNATIONAL ASSOCIATION OF
BRIDGE, STRUCTURAL AND ORNAMENTAL
IRON WORKERS, AFL-CIO,

Appellant-Appellee,

v.

KEVIN STEEL PRODUCTS, INC.,

Appellee-Appellant,

and

NATIONAL LABOR RELATIONS BOARD,

Intervenor-Appellee.

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No. 74-2154

CERTIFICATE OF SERVICE

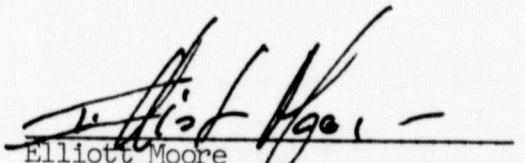
The undersigned hereby certifies that three (3) copies of
the Board's offset printed brief in the above-captioned case, has
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